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Reconciling a Debtor's Right to Privacy with a Ch. 7 Trustee's Duties

In a unanimous decision, the U.S. Supreme Court in *Riley v. California* held that the Fourth Amendment does not, without a warrant, permit law enforcement officials to search digital information on a cellphone from an individual who has been arrested.¹ The decision recognized important privacy concerns in the digital age, given the “element of pervasiveness that characterizes cellphones but not physical records,” noting that “many of the more than 90% of American adults who own a cellphone keep on their person a digital record of nearly every aspect of their lives — from the mundane to the intimate.”²

In a chapter 7 case, a trustee is charged with broad responsibilities — including the duty to collect property of the estate and investigate the debtor's financial affairs.³ The Bankruptcy Code requires that the debtor cooperate with the trustee as necessary to perform the trustee's duties, and surrender to the trustee all property of the estate and recorded information relating to property of the estate, including books, documents, records and papers.⁴ Information relevant to property of the estate may be held by debtors in digital form. This article addresses Fourth Amendment issues implicated in bankruptcy cases and the potential impact of *Riley*.

Applicability of the Fourth Amendment

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall [be] issue[d], but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵

Two fundamental principles need to be considered when applying the Fourth Amendment in bankruptcy cases: The Fourth Amendment (1) protects citizens from abuses by the government, although not from actions of private parties;⁶ and (2) only protects against “unreasonable” search

and seizure.⁷ As to the first principle, the issue of whether a bankruptcy trustee acts on behalf of the government in carrying out his/her duties is unsettled. To be sure, a trustee is not an agent or employee of the U.S.⁸ In connection with the Fourth Amendment, a trustee has been held to not be a federal “law enforcement officer” nor an “attorney for the government” that is entitled to obtain a search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure.⁹

On the other hand, the Fourth Amendment has been applied to the conduct of private parties acting as instruments or agents of the government.¹⁰ At least two courts have observed that the status and function of a trustee in a chapter 7 case suggests a sufficient nexus to the government and its power to apply to the trustee the Fourth Amendment limits on government power.¹¹

The second principle to be considered is that the Fourth Amendment only protects against “unreasonable” search and seizure. A search occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed.”¹² Whether a search is reasonable depends on the totality of the circumstances, as well as “balancing the need to search against the invasion [that] the search entails.”¹³ In the absence of a warrant, a search is only reasonable if it falls within a specific exception to the warrant requirement.¹⁴

In those classes of cases in which the U.S. Supreme Court has held that an invasion of Fourth Amendment privacy interests may be deemed “reasonable” without a warrant, the public interest in permitting the search has been found to outweigh the individual privacy interest implicated by such searches.¹⁵ In a civil context,



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1 --- U.S. ---, 134 S. Ct. 2473 (June 25, 2014).

2 134 S. Ct. at 2490 (citing *Ontario v. Quon*, 560 U.S. 746, 760 (2010)).

3 11 U.S.C. § 704(a)(1) and (4).

4 11 U.S.C. § 521(a)(3) and (4); Fed. R. Bankr. P. 4002(b).

5 U.S. Const. Amend. IV.

6 *In re Kerlo*, 311 B.R. 256, 263 (Bankr. C.D. Cal. 2004) (citing *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)).

7 *Taunt v. Barman* (*In re Barman*), 252 B.R. 403, 413 (Bankr. E.D. Mich. 2000) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971), and *Tarter v. Raybuck*, 742 F.2d 977, 981 (6th Cir. 1984)).

8 *Youngman v. Bursztyn* (*In re Bursztyn*), 366 B.R. 353, 368 (Bankr. D.N.J. 2007). (citing *Cromelin v. U.S.*, 177 F.2d 275 (5th Cir. 1949) (stating that trustee “is in no sense an agent or employee or officer of the United States”), *questioned on other grounds in Sullivan v. U.S.*, 21 F.3d 198, 202-03 (7th Cir. 1994); *Wells v. U.S.*, 98 B.R. 806, 810 (N.D. Ill. 1989) (same)).

9 *Application of Trustee in Bankruptcy for Search Warrant*, 173 B.R. 341, 342 (N.D. Ohio 1994); *Kerlo*, 311 B.R. at 265 (“Trustees in bankruptcy are not law enforcement officials ... trustees act independently under their statutory mandate in the Bankruptcy Code.”); *see also In re Toft*, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011).

10 *Kerlo*, 311 B.R. at 265 (citing *Coolidge*, 403 U.S. at 487).

11 *Barman*, 252 B.R. at 412-13; *Bursztyn*, 366 B.R. at 368.

12 *Bursztyn*, 366 B.R. at 363 (citing *U.S. v. Jacobsen*, 466 U.S. 109 (1984) (other citations omitted)).

13 *Bursztyn*, 366 B.R. at 369 (citing *Samson v. Cal.*, 126 S. Ct. 2193, 2197 (2006), and *N.J. v. T.L.O.*, 469 U.S. 325, 340-41 (quoting *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523, 528 (1967))).

14 *Riley*, 134 S. Ct. at 2482 (citing *Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011)).

15 *Blackwelder v. Safnauer*, 689 F. Supp. 106, 139 (N.D.N.Y. 1988) (citing *Camara*, 387 U.S. at 583; *United States v. United States District Court*, 407 U.S. 297, 315 (1972)).

the Supreme Court held that a warrantless home visit upon notice that had been undertaken by a state employee to determine a recipient's eligibility for government benefits was not an unreasonable search and did not violate the Fourth Amendment.¹⁶ The Court stated that even if that warrantless home visit did involve some elements of a search, it was not an unreasonable search because of the factors involved, including the following:

- The public's interest in the dependent child's needs were paramount to those claimed by the mother;
- The state's need for a "gentle means" of determining that the intended objects of the public assistance were the ones actually benefitting from it;
- The home visit was part of an established routine that prohibited forced entry, visitation outside of normal business hours and snooping in the home;
- The required information could not be obtained without a home visit;
- The visit was by a caseworker and not by the police for criminal investigation purposes; and
- A warrant procedure would be "out of place."¹⁷

Reduced Expectation of Privacy in Bankruptcy Cases

The initiation of a bankruptcy case necessarily involves a significantly reduced expectation of privacy in a debtor's "houses, papers, and effects," which results from the substantial and detailed disclosures that are required in the bankruptcy process.¹⁸ The statutory obligations imposed on a debtor to disclose personal information and submit oneself to the bankruptcy process results in a reduced expectation of privacy in a debtor's property.¹⁹

Perhaps the most significant legal consequence when a voluntary bankruptcy case is filed is that all of the debtor's assets become property of the bankruptcy estate and might be used to pay creditors, subject to the debtor's ability to assert specified property as exempt.²⁰ Section 541(a) states that the commencement of a case creates an estate, and broadly defines "property of the estate" to include all legal or equitable interests of the debtor in property as of the commencement of a case, "wherever located and by whomever held."²¹

Section 521(a) requires that a debtor file "a list of creditors ... a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs."²² The required forms and disclosures are extensive and become a "matter of public record, conditioned only upon the extent of the debtor's honesty and detail."²³

Also, balanced against a debtor's privacy interests is the strong public interest and policy in the full, open and proper administration of a bankruptcy case by a trustee, including a thorough investigation of the debtor's assets.²⁴ A debtor "who comes to the bankruptcy court must come clean, make

full disclosure of all information relevant to the administration, and must fully cooperate with the trustee."²⁵

Although a debtor has a diminished expectation of privacy after filing for bankruptcy, a debtor still maintains some reasonable expectation of privacy in regards to his/her property. In the vast majority of chapter 7 cases, a debtor's property is of inconsequential value to the estate due to the debtor's exemptions.²⁶ As exempt property reverts to the debtor shortly after the debtor's case is filed, the "estate's interest in the property is quite limited, both in time and in function, and the debtor retains a substantial practical and beneficial interest in that property even while it is temporarily property of the estate."²⁷

Implications of Riley

In a voluntary bankruptcy case, a debtor's right to privacy in property might be outweighed by a debtor's duty to cooperate and turn over such property or information to the trustee.²⁸ The trustee's need to investigate the information that a debtor has provided in his/her bankruptcy case might include the physical inspection of estate assets, and if necessary, the seizure of assets.²⁹

Debtors increasingly maintain and transmit information regarding themselves and their property in an electronic format. This may encompass not only information contained on cellphones as addressed in the *Riley* decision, but information stored on home or employer-owned workplace computers and other electronic devices, as well as the files stored on such devices, Internet, website and social media postings on websites such as Facebook, Twitter, MySpace and LinkedIn, email, metadata and other electronic records.

Unquestionably, electronically stored information is discoverable in litigation, including bankruptcy cases, and might be a source of relevant information regarding income or assets.³⁰ In the occasional case in which a debtor refuses

24 *Bursztyn*, 366 B.R. at 371 (citing *Barman*, 252 at 417; *Dougherty v. Capital Cities Comm. Inc.*, 631 F. Supp. 1566, 1571 (E.D. Mich. 1986); *Roudebush v. Sharp (In re Sharp)*, 244 B.R. 889, 891 (Bankr. E.D. Mich. 2000) (quoting *Cohen v. McElroy (In re McElroy)*, 229 B.R. 483, 488 (Bankr. M.D. Fla. 1998) ("Without doubt, a debtor's honest and full disclosure is 'essential to the administration of the bankruptcy estate.'"); *In re Walker*, 323 B.R. 188, 198 (Bankr. S.D. Tex. 2005) (quoting *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996) ("The integrity of the entire bankruptcy system rests upon full and honest disclosure by debtors of all of their assets."); *Schechter v. Hansen (In re Hansen)*, 325 B.R. 746, 757 (Bankr. N.D. Ill. 2005) (quoting *Urological Group Ltd. v. Petersen (In re Petersen)*, 296 B.R. 766, 790 (Bankr. C.D. Ill. 2003) ("The very integrity of the bankruptcy court and the successful administration of the bankruptcy system rest upon compliance with the debtor's obligation of disclosure.")).

25 *Id.* at 371-72 (citing *U.S. Trustee v. Gardner*, 344 B.R. 663, 667 (Bankr. M.D. Fla. 2006) (citing *Kentile Floors Inc. v. Winham*, 440 F.2d 1128 (9th Cir. 1971); *N. Trust Co. v. Garman (In re Garman)*, 643 F.2d 1252 (7th Cir. 1980); *In re Wimpee*, 343 B.R. 845, 849 (Bankr. W.D. Ky. 2006) ("[T]he protection provided by the Bankruptcy Code was intended to aid the 'honest but unfortunate debtor.' *Cohen v. de la Cruz*, 523 U.S. 213 (1998). As such, this Court expects debtors who seek such protection to deal with this Court, the Trustee, and all creditors with all candor."); *U.S. Trustee v. Halishak (In re Halishak)*, 337 B.R. 620, 624 (Bankr. N.D. Ohio 2005) (noting that "in exchange for receiving the benefits of a bankruptcy discharge, debtors are expected to fully, honestly and unconditionally cooperate with the bankruptcy process"); *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987) ("Those who seek the shelter of the Bankruptcy Code [must] not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to [e]nsure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction.").

26 *Barman*, 252 B.R. at 414.

27 *Id.* at 415.

28 11 U.S.C. §§ 521(a) and 542(a); see also *Bursztyn*, 366 B.R. at 373 (search of debtor's residence and seizure of jewelry and artwork was reasonable under circumstances of that case); *Barman*, 252 B.R. at 419 (Fourth Amendment protections not violated in trustee's cooperative inspection of home); *Bodeker*, 2013 WL 2467975, at *17 (trustee's search and orderly removal of gold and silver from debtor's residence did not implicate any Fourth Amendment rights).

29 11 U.S.C. § 704(a)(1); *Bursztyn*, 366 B.R. at 372 (citing *In re Washington*, 232 B.R. 814 (Bankr. S.D. Fla. 1999), and *Barman*, 252 B.R. at 416-17)).

30 See, e.g., *D.O.H. v. Lake Central School Corp., et al.*, 2:11-CV-430, 2014 WL 174675 (N.D. Ind. Jan. 15, 2014) (discussing discovery standards and finding that electronic records, including social media and music videos, are discoverable).

16 *Wyman v. James*, 400 U.S. 309, 318 (1971); *Barman*, 252 B.R. at 416 (discussing *Wyman*).

17 *Id.*

18 *Barman*, 252 B.R. at 414.

19 *Bursztyn*, 366 B.R. at 371 (citing *U.S. v. Andujar*, 209 Fed. App'x 162, 166, 2006 WL 3741843, *2, 2006 U.S. App. LEXIS 31427, at *8 (3d Cir. 2006)).

20 *In re Bodeker*, No. 12-60137, 2013 WL 2467975, at *10 (Bankr. D. Mont. June 7, 2013) (citing *Schwab v. Reilly*, --- U.S. ---, 130 S. Ct. 2652, 2657 (2010)).

21 11 U.S.C. § 541(a); *U.S. v. Whiting Pools Inc.*, 462 U.S. 204-05 (1983); *Bodeker*, 2013 WL 2467975, at *10.

22 11 U.S.C. § 521(a); see also *Barman*, 252 B.R. at 414.

23 *Id.*

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to provide access to property or information, *Riley* suggests that a debtor's privacy rights may limit access to certain types of information until an order for access or turnover of such property or information can be obtained. This poses problems in case administration, given the limited time that a trustee initially has to investigate a debtor's affairs, and leaves open the question of whether the form of such an order can be issued under § 542 of the Bankruptcy Code³¹ or other discovery tools, or must be sought in conjunction with or by criminal law enforcement officers.

³¹ 11 U.S.C. § 542.

Most debtors fully cooperate in the chapter 7 process and are granted discharges within a few months of their cases being filed. Debtors recognize that disclosure and access to information are critical to the process, so cooperation is not an issue. No "search" is implicated and no "warrant" is necessary in these cases, as information is freely provided.

Even if there could be deemed to be a "search" of some kind, it is not "unreasonable" under the circumstances whereby the debtor voluntarily submits to the bankruptcy process and the trustee seeks to administer each case diligently and efficiently. The trustee's statutory mandate is fulfilled expeditiously in these cases as contemplated by the bankruptcy system. **abi**